IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the court of appeals, reported at 550 F.2d 396 (8th Cir. 1976), is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at A-1 (disposition on rehearing *en banc*) and B-1 (opinion of the original panel). The relevant decisions of the district court in these cases are unreported but are printed, Pet. App. at C-1 (*Philippines* case), Pet. App. at D-1 (*India* case), and Pet. App. at E-1 (*Philippines, Iran* and *South Vietnam* cases). For an earlier district court opinion in the related *Kuwait* case, see *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971), reprinted in the separate Appendix (A5).

Jurisdiction

The judgment of a panel of the Court of Appeals for the Eighth Circuit was entered on May 19, 1976. A timely petition for rehearing *en banc* was granted and, after such rehearing on August 17, 1976, the judgment of the court of appeals was entered on September 3, 1976. Pet. App. at F-1. The petition for a writ of certiorari was filed within ninety days thereafter, on December 1, 1976, and was granted on April 18, 1977. The Court's jurisdiction rests upon section 1254(1) of title 28 of the United States Code.

Question Presented

Are foreign countries "persons" entitled to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15?

Statutory Provisions Involved

The Clayton Act, Act of Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended:

Section 4.

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

38 Stat. 731 (codified at 15 U.S.C. § 15 (1970)).

Section 1.

* * *

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

38 Stat. 730 (codified at 15 U.S.C. § 12 (1970)).

STATEMENT OF THE CASE

Proceedings in the District Court

Respondents India, Iran, the Philippines and South Vietnam sued the petitioning pharmaceutical companies for treble damages, alleging that the companies had violated sections 1 and 2 of the Sherman Act by conspiring to restrain and monopolize trade in tetracycline, a broad spectrum antibiotic (A121, A29, A87, A58).[1] India also alleged a violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (A122). All alleged that they were sovereign states recognized by the United States (A106, A13, A74, A42), and invoked the district court's jurisdiction pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, and 28 U.S.C. § 1337 (A105-106, A12, A71, A41-42).[2]

By way of affirmative defense, petitioners challenged the right of the foreign countries to sue under section 4 of the Clayton Act, contending that such countries were not among the "persons" on whom that section confers a cause of action. Issue was joined by motion to dismiss in the cases of South Vietnam, Iran and India (A1, A101, A133). The Philippines, in turn, moved to strike petitioners' affirmative defense (A10).

Holding that foreign countries are persons entitled to sue for treble damages, the district court granted the Philippines' motion to strike (Pet. App. C-8), denied petitioners' motions to dismiss (Pet. App. D-2, E-5), and also ordered the affirmative defenses stricken in the South Vietnam and Iran cases. Pet. App. E-5.[3] Thereafter, the

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1. The South Vietnam case was dismissed by the district court on December 2, 1976, after receipt of advice that the United States no longer recognized any government as sovereign in the former territory of that republic. Dismissal was affirmed on appeal. *Republic of Vietnam* v. *Pfizer Inc.*, No. 4-71 Civ. 402 (D. Minn. Dec. 2, 1976), *aff'd*, No. 77-1093 (8th Cir. June 15, 1977).

2. For the historical background of the litigation, see the Petition for Certiorari at 2 n.3.

3. The district court did not rule on motions to dismiss the claims of the Federal Republic of Germany and Colombia, the only other foreign countries that have claims outstanding in this litigation. Claims by South Korea, Spain and Kuwait have been withdrawn.

district court held that there was "substantial ground for difference of opinion" as to the correctness of its decisions and certified them for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. D-2, E-5.

The Court of Appeals for the Eighth Circuit, which had earlier ruled that the district court's refusal to dismiss the foreign governments' claims could not be challenged on mandamus (*see Pfizer Inc.* v. *Lord*, 522 F.2d 612, 614-15 (8th Cir. 1975)), agreed to hear the interlocutory appeal.

The Decision of the Original Panel of the Eighth Circuit

On May 19, 1976 a panel of the Eighth Circuit affirmed the judgment of the district court. The panel noted that this is a case of "first impression" (Pet. App. B-2, 550 F.2d at 397), and stated that "whether a foreign government may sue under the Clayton Act turns on the interpretation of the statute and nothing more. Our task is to determine the intent of Congress in passing the Act." Pet. App. B-3, 550 F.2d at 397. It observed that "[t]wo decisions of the United States Supreme Court offer guidance . . . ." Pet. App. B-4, 550 F.2d at 398. In one, *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), the Court held that the United States is *not* a "person."[4] In the other, *Georgia* v. *Evans*, 316 U.S. 159 (1942), the Court held that a State of the United States *is* a "person" entitled to sue for treble damages. Comparing the two cases, the panel concluded that *Georgia* v. *Evans* was controlling as to the right of a foreign country to sue. "In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the

4. Thereafter, Congress gave the United States a right to sue for *single damages*, but withheld the treble damage remedy. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282 (codified at 15 U.S.C. § 15a (1970)).

antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right." Pet. App. B-7, 550 F.2d at 399.

One member of the panel, Judge Ross, concurred "because I think the result is mandated by *Georgia* v. *Evans*," but added that, in his view,

> Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are "persons" under the Act. In my opinion it is time for Congress to re-examine this extremely important question and clarify it by legislation.
> Pet. App. B-7 to B-8, 550 F.2d at 399-400.

The Decision *En Banc*

After rehearing *en banc* before the eight judges of the circuit in regular active service (including all three members of the original panel), six judges adhered to the decision of the original panel. Three of the six (Chief Judge Gibson, Judge Webster and Judge Ross himself) also joined in the original concurrence of Judge Ross. Pet. App. A-1, 550 F.2d at 400.

Judges Bright and Henley filed a dissenting opinion. Pet. App. A-1, 550 F.2d at 400. They found it

> anomalous to suggest that foreign sovereigns should enjoy the right to sue for treble damages when that right has not been granted to the United States. The *Cooper* Court stated, "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." [312 U.S.] at 604. Furthermore, the Court noted that "if the United States was intended to be included Congress would have so provided expressly." *Id.* at 607. We would apply this pronouncement here and exclude foreign governments as "persons" entitled to sue under the Clayton Act. Pet. App. A-2, 550 F.2d at 400.

The dissenters found no "evidence that Congress considered granting a foreign government the right to sue for treble damages" and noted that three of the six members of the majority had expressed the same view. Pet. App. A-2, 550 F.2d at 400.

Challenging the majority's conclusion that *Georgia* v. *Evans* could be used as a basis for imputing to Congress an intent to confer the treble damage right upon all "bodies politic," the dissenters observed that,

> If this conclusion rests upon Congressional intent, the analysis is tenuous at best. If this conclusion is bottomed upon reasoning that since *Evans* expanded the reach of the term "person," the definition of "person" should now be even further expanded, then the majority has adopted a questionable principle of statutory construction.
> Pet. App. A-3, 550 F.2d at 401.

In the view of the dissenting judges,

> The Judiciary ought not to add foreign governments to the "person" class without a clear Congressional intent to do so.
> Pet. App. A-2, 550 F.2d at 400.

SUMMARY OF ARGUMENT

The question for decision in these cases is whether, by the use of the phrase "any person" in section 4 of the Clayton Act and its predecessor, section 7 of the Sherman Act, Congress intended to confer upon foreign governments the right to sue for treble damages under the antitrust laws of the United States. The question is not whether foreign governments may be described as juristic persons, or whether they should be allowed to vindicate their rights in our courts. As this Court explained in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), "[t]he Sherman Act . . . created new rights and remedies which are available only to those on whom they are conferred by the Act." *Id.* at 604.

The court of appeals correctly recognized that the task of decision was to determine "the intent of Congress in passing the Act." Pet. App. B-3, 550 F.2d at 397. But it erred in concluding that, since a State of the Union is allowed to sue for treble damages, Congress must have "intended other bodies politic . . . to enjoy the same right." Pet. App. B-7, 550 F.2d at 399.

Georgia v. *Evans*, 316 U.S. 159 (1942), contained no suggestion that the Congress which enacted the Sherman Act had regarded all "bodies politic" as "persons." Indeed, upon enactment of the Revised Statutes in 1874, Congress had deleted "bodies politic" from the list of entities to which the term "person" might "extend and be applied" in federal statutes. Revised Statutes § 1, 18 Stat., pt. 1, at 1 (1874). It did so on the recommendation of the Commissioners for statutory revision, in order to eliminate an ambiguity and to ensure that, when used in subsequent federal statutes, "person" would not be extended to include "States, Territories, foreign governments, &c.," without special definition. *See* I REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (Revisers' Note). And in 1876 this Court had confirmed the general rule that, when used in legislation, "person" did not include foreign or coordinate sovereigns unless extended by special definition. *United States* v. *Fox*, 94 U.S. 315, 321 (1876).

When Congress legislated against this background in 1890 it conferred the cause of action for treble damages only upon "persons," and it defined that term in section 8 of the Sherman Act to reach all business entities, "corporations and associations," that might do business upon American markets, but not sovereign governments.

In *United States* v. *Cooper Corp.* this Court confirmed the authority of the *Fox* case (*see* 312 U.S. at 604) and held that the Sherman Act's reference to "person" did not embrace a sovereign government such as that of the United States.

In *Georgia* v. *Evans* the Court also recognized the general rule that "person" is ordinarily construed to exclude sovereign governments, but held that this was not a " 'hard and fast rule of exclusion,' " and that, in view of the "legislative environment," the "purpose, the subject matter, the context, the legislative history," Congress must have intended to confer a federal antitrust remedy upon the States of the Union, even though it had not regarded the national government as a "person." 316 U.S. at 161. Since the requirements of our federal system limit the States' freedom to impose their own laws upon interstate commerce, it would have been anomalous to conclude that Congress had exercised the commerce power to enact comprehensive antitrust legislation without providing any remedy for the States. Indeed, a principal purpose for enactment of the federal antitrust law had been to supplement the protection afforded by state antitrust laws.

In extending *Georgia* v. *Evans* to hold that all "bodies politic" except the United States should be deemed "persons," the court of appeals applied an erroneous "hard and fast rule" of *in*clusion, which disregarded the very factors which *Georgia* v. *Evans* held determinative.

The "legislative environment" in which Congress wrote the Sherman law was characterized by a concern for the protection of domestic interests. While Congress exercised supreme power over interstate trade, it was well aware that its jurisdiction over international trade was only concurrent with that of other sovereign powers, and that such powers sought to regulate trade in accordance with their own economic interests and policies. Far from seeking to foster the commercial well-being of such powers, the Congresses which enacted the Sherman and Clayton laws regarded them as trading rivals, responsible for their own protection.

In view of the purpose of the antitrust laws to protect domestic consumers and competitors, Congress could have had no notion that the Judiciary might undertake to expand the meaning of "person" to include foreign governments.

The interests of foreign governments were not among those which Congress sought to protect, and this Court has held that, despite its usefulness as a deterrent, the treble damage remedy is indeed a remedy, reserved for redress of the kind of injury which Congress sought to prevent. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690 (1977).

It has been suggested that suits by foreign governments should nonetheless be allowed in order to supplement the federal government's enforcement capacity, so as to deter future violations. But it is improbable that Congress would have thought it appropriate to recruit foreign governments, most of which do not espouse our nation's antitrust principles, to assist the Executive Branch in enforcing our laws. Such an enforcement scheme should not now be embraced by judicial decision.

In conferring the treble damage remedy only upon "persons," Congress withheld that remedy from our own government. Foreign sovereigns will not respect our nation the less if they are remitted to their antitrust remedies against their suppliers under their own laws.

ARGUMENT

I.

THERE IS NO EVIDENCE WHATEVER THAT CONGRESS INTENDED TO CONFER THE CAUSE OF ACTION FOR TREBLE DAMAGES UPON FOREIGN GOVERNMENTS, AND IT LEGISLATED IN TERMS WHICH IT UNDERSTOOD TO EXCLUDE SUCH A RESULT.

A. The Legislative Environment Shows that Congress Sought to Ensure the Benefits of Free Competition for the People of the United States, Not to Extend Benefits to Foreign Countries.

The statutory provisions here at issue were first enacted by the Fifty-first Congress, as sections 7 and 8 of the Sherman Act.[5] Section 7 conferred the treble damage remedy only upon "persons," and "[t]he discussions of this section on the floor of the Senate indicate that [the treble damage remedy] was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 n.10 (1977). The essential purpose of the Act itself was to apply a remedy against "combinations which injuriously affect the interests of the United States." 21 Cong. Rec. 2456 (1890) (Sen. Sherman).[6]

5. Act of July 2, 1890, ch. 647, §§ 7 & 8, 26 Stat. 210. The provisions were again enacted, respectively, as sections 4 and 1 of the Clayton Act. Act of Oct. 15, 1914, ch. 323, §§ 1 & 4, 38 Stat. 730-31. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 610 (1941). Section 4 of the Clayton Act and section 7 of the Sherman Act were codified as a single section of the United States Code, 15 U.S.C. § 15. *See Georgia* v. *Evans*, 316 U.S. 159, 160 (1942). In 1955, section 7 of the Sherman Act was repealed as duplicative of section 4 of the Clayton Act. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283. *See* S. Rep. No. 619, 84th Cong., 1st Sess. 2 (1955).

6. Those who favored passage of the Act intended it to benefit "the whole people whose interests are common." 21 Cong. Rec. 2727 (Sen. Edmunds); "the citizen," "our men and women," "the pockets of the poor," 20 Cong. Rec. 1457 (1889) (Sen. Jones); "unfortunate victims, the people of the United States," "our people," 21 Cong. Rec. 1768 (Sen. George); "the prosperity and welfare of the people," *id.* at 1771 (Sen. George); "the great mass of the people," *id.* at 2564 (Sen. Reagan); "the workingmen all over our land, . . . the farmers in their alliances," *id.* at 2569 (Sen. Sherman); "people . . . all over this broad land, the consumers . . ." *id.* at 2571 (Sen. Hiscock); "the sixty-five millions of people in the United States who use oil," *id.* (Sen. Teller).

As a spokesman for the Department of Justice recently affirmed,

> [T]he one clear purpose which does come through in the floor debates is a concern that United States consumers and small businessmen had been victimized by large and powerful trusts which organized themselves not only here but also abroad and which had controlled prices in our markets. There is not a shred of evidence that any of those who sponsored the Sherman Act intended it as a magna carta of competition for the benefit of foreign persons in foreign markets, to hold to account United States exporters engaged in restrictive practices in those markets.
>
> Address by Douglas E. Rosenthal, Assistant Chief, Foreign Commerce Section, Antitrust Division, Department of Justice, to the American Society of International Law Annual Meeting (April 23, 1977).

The Fifty-first Congress enacted both the Sherman Law and the McKinley Tariff at the same session, and the Sherman Act's legislative history shows "an appreciation of the relationship between imports and domestic competition . . . ."[7] While we do not suggest that the McKinley Tariff and the Sherman Act should be construed in all respects *in*

7. K. Brewster, Antitrust and American Business Abroad 21 (1958). It was believed that while the tariff served to foster domestic industries, it also shielded them from foreign competition and thus helped to create the conditions in which domestic trusts might thrive. *See, e.g.*, 21 Cong. Rec. 1768 (1890) (remarks of Sen. George); *id.* at 4093 (Rep. Wilson). Senator Sherman had

pari materia (*see Erlenbaugh* v. *United States*, 409 U.S. 239, 243-44 (1972)), the two Acts were enacted at the same session of Congress, both contained the terms "person" and "foreign country," and both sought to protect related interests of the American economy[8]. Accordingly, the terms and policies of the two Acts should be given a consistent interpretation, as should the terms and policies of the Wilson Tariff Act of 1894, in which Congress again combined antitrust and tariff legislation. *See, e.g., United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 277 (1975); *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 647-48 (1931).[9]

"Person" was used in the McKinley Tariff Act solely to designate those who might be subject to criminal penalties or eligible for the domestic sugar bounty, and the Fifty-first Congress certainly could not have understood the term to include foreign countries in the context of that Act.[10]

originally conceived of his antitrust bill as based in part on the authority of Congress to impose tariffs on imports and to tax domestic goods which competed with imports. *See* 21 CONG. REC. 2598 (1890) (remarks of Sen. George); 20 CONG. REC. 169 (1888) (Sen. Reagan). At one stage Senator Sherman suggested that the tariff might be suspended in order to combat restraints of trade (*see* 21 CONG. REC. 2457 (1890)), but he receded from this position; and the Senate rejected such an amendment to the antitrust bill. 21 CONG. REC. 2661 (1890).

8. The McKinley Tariff sought to foster domestic industries and also placed sugar on the free list in order to destroy the "sugar trusts." *See* 21 CONG. REC. 5031 (Rep. Pickler); 21 CONG. REC. APP. 300 (1890) (Rep. Hermann) (McKinley Tariff "will destroy the most gigantic and merciless trust of the whole lot").

9. The Wilson Tariff Act was the Act of Aug. 27, 1894, ch. 349, 28 Stat. 509-70. Section 73 thereof, 15 U.S.C. § 8, provides a treble damage remedy for "persons" which is closely related to that of section 7 of the Sherman Act.

10. *See* McKinley Tariff Act, Act of Oct. 1, 1890, ch. 1244, § 1 (234)-(236), 26 Stat. 584 (sugar bounty); *id.* §§ 11, 12 & 20, 26 Stat. 614-16 (criminal penalties). "Foreign country" is referred to in sections 11 and 20, 26 Stat. 614-16, and "Government of any country" is referred to in section 3 of the Act, 26 Stat. 612.

The two Acts emerged from the same "legislative environment," and both reflected national economic policy. As Representative McKinley explained, some six weeks before final passage of the Sherman Act:

> We are not legislating for any nation but our own; for our people and for no other people are we charged with the duties of legislation. We say to our foreign brethren, "We will not interfere in your domestic legislation; we admonish you to keep your hands off of ours."
> 21 CONG. REC. 4253 (May 7, 1890).[11]

Both McKinley and Senator Sherman regarded the protection of domestic interests as paramount. Speaking with Sherman in Boston in 1888, McKinley had declared:

> Let England take care of herself, let France look after her interests, let Germany take care of her own people, but in God's name let Americans look after America![12]

Senator Sherman's speech on the same occasion reflected agreement:

> I am one of those unchristian men who believe the best we can do for mankind is to do the best we can for our country. I suppose that in Congress, at

11. The McKinley Tariff was extensively debated in the House of Representatives on May 7-10, 12-17, and 19-21. *See* 21 CONG. REC. 4246-5113 (1890) *(passim)*. The Sherman Act, as passed by the Senate, had been reported to the House on April 25, 1890 (*see* H.R. REP. No. 1707, 51st Cong., 1st Sess. (1890)), was amended and passed by the House on May 1, and was passed in its final form on June 20, 1890. *See* 21 CONG. REC. 4104, 6313.

12. Address by Rep. William McKinley, Home Market Club Banquet, Boston, Mass. (Feb. 9, 1888), *reprinted in* SPEECHES AND ADDRESSES OF WILLIAM MCKINLEY FROM HIS ELECTION TO CONGRESS TO THE PRESENT TIME 257 (1893).

> least, we are to legislate for the United States, and that on the question of home market or foreign market we are to be guided by the interests of the people of the United States.[13]

Although some in Congress argued that a protective tariff harmed the interests of domestic consumers, they did not challenge the fundamental principle that the object of all national economic legislation was to serve the interests of the United States, not foreign countries.[14] As Representative McKinley explained, "Here we are one country, one language, one allegiance, one standard of citizenship, one flag, one Constitution, one nation, one destiny. It is otherwise with foreign nations, each a separate organism, a distinct and independent political society organized for its own, to protect its own, and work out its own destiny." 19 CONG. REC. 4401 (1888).

The validity of the "economic judgment" of the Fifty-first Congress need not be endorsed by the courts; "but it is quite relevant in interpreting the language Congress chose." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968). In view of the related purposes of the tariff and the Sherman Act of 1890, and the legislative environment in which the two Acts were con-

13. Address by Senator Sherman, Home Market Club Banquet, Boston, Mass. (Feb. 9, 1888), *reprinted in pamphlet* "FREE RAW MATERIALS" EXPOSED 8 (1888). Senator Sherman had expressed the same view to the Senate. *See* 19 CONG. REC. 192 (1888).

14. *See, e.g.*, 21 CONG. REC. 4317 (1890) (Rep. Dockery) (low, not high, tariff would lead to "ultimate prosperity and grandeur of the American Republic"); *id.* at 4334 (Rep. Flower) ("Our object should be to promote every legitimate interest," not just manufacturing); *id.* at 4514 (Rep. Boatner) ("I approve entirely the policy which will give to American industries the American market" but protest the system "of adding to one man's prosperity at the expense of another").

ceived by the same Congress, it cannot be seriously contended that Congress would have thought it just or advantageous to extend the protection of the antitrust law to foreign governments, or that it would have wished to confer on them a treble damage remedy which it chose to withhold from our own government. *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941).

Congress never debated the question whether foreign governments should be granted a cause of action under the antitrust law because such a proposal was never made. The successive versions of the Sherman bill and the final draft prepared by the Senate Judiciary Committee were expressed in terms which Congress understood to preclude any such interpretation.

B. Congress Conferred the Cause Of Action For Treble Damages Only Upon "Persons," and It Understood that Term to Exclude Foreign Governments Unless Extended by Special Definition.

1. As Used in the Successive Drafts of the Sherman Bill, "Person" Meant Natural Person.

The six successive drafts of the Sherman bill would have conferred a cause of action for double damages upon any "person or corporation injured or damnified."[15] The use of the disjunctive, "person or corporation," suggested that "person" was used in its primary sense as meaning natural person. *See, e.g.*, BOUVIER'S LAW DICTIONARY 403 (1884 ed.). Senator Sherman described the damage remedy as "purely a personal remedy, a civil suit also by citizens of the United States." 21 CONG. REC. 2564 (1890). He sug-

15. For the text of the drafts, see 21 CONG. REC. 2597-2600 (1890) (reprinted to accompany speech of Sen. George).

gested that "men of spirit" would use it to combat the trusts. *Id.* at 2569.

The first four drafts of the Sherman bill also sought to impose liability upon "persons and corporations." After the argument was made that the antitrust bill exceeded the authority of Congress under the commerce clause, (*see* 21 Cong. Rec. 1768-72 (1890) (remarks of Sen. George)), Senator Sherman responded with a fifth draft, which purported to base the enactment upon the diversity jurisdiction of the federal courts under the Constitution, article III, section 2, and sought to impose liability upon combinations of "citizens or corporations" of diverse citizenship. *See* 21 Cong. Rec. 2455. In the course of debate it became apparent that introduction of a diversity requirement did not strengthen the jurisdictional basis of the bill (*see id.* 2463-65 (remarks of Sens. Sherman and Vest), 2556 (Sen. Turpie), 2567 (Sen. Hoar), 2600 (Sen. George)), and Senator Sherman agreed to base the act solely upon the commerce power. *Id.* at 2567, 2605, 2612-13.

The bill as it stood after elimination of the diversity clause forbade combinations "between two or more citizens or corporations." *Id.* at 2613. Senator Sherman then offered "one or two verbal amendments that I should like to have made." *Id* at 2639. One was to "strike out the word 'citizens' and insert the word 'persons'" in section 1. *Id.* This was agreed to. The purpose of the change was to ensure that liability under the Act would extend to all natural persons regardless of their citizenship.

2. *In Its Final Draft of the Bill, the Senate Judiciary Committee Used "Person" as a Defined Term Whose Scope Had Been Established By Statutory Revision and Judicial Construction.*

After the Sherman bill and the criminal provisions sponsored by Senator Reagan were adopted by the Senate in Committee of the Whole, the legislation was made "unwieldy" by addition of the Ingalls provisions, which would have imposed a prohibitive tax on speculative trading in numerous commodities. *See United States* v. *Wise*, 370 U.S. 405, 419 (1962) (Harlan, J., concurring). Senator George had argued that the Sherman bill exceeded the authority of Congress under the commerce clause and that the Senate Judiciary Committee, on which he served, should be allowed to redraft it. 21 Cong. Rec. 2600 (1890). The argument was renewed by Senator Hawley, who argued that the Judiciary Committee was "a body of veteran teachers and practicers of law [whom we have chosen] for the express purpose of getting the best advice possible, and we have not used our own machinery." *Id.* at 2660. After the Committee's chairman, Senator Edmunds, stated that he would have to oppose the Sherman bill as unconstitutional unless it was redrafted (*id.* at 2727-28), the Senate voted to refer the bill to the Committee. *Id.* at 2731.

As Senator Edmunds explained in The North American Review in 1911, the Judiciary Committee struck out the entire bill and reported a substitute, which was ultimately enacted by Congress without amendment.[16] The evidence indicates that Senator Edmunds himself was the principal draftsman of the Act and that Senator Hoar wrote section 7. *See Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 n.10 (1940) (Senators Edmunds and Hoar "probably drafted

16. Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. Am. Rev. 801, 809, 811 (1911).

the bill").[17] The Committee's minute book shows that it took as its first order of business a resolution of the constitutional problem evoked on the floor by Senators George and Edmunds.[18] The Ingalls provisions were eliminated without recorded discussion, apparently on the ground that tax legislation must originate in the House of Representatives. *See* 21 CONG. REC. 2728 (remarks of Sen. Edmunds). In other respects, the work of the Committee has been described as a "general streamlining of the bill . . . with no intention of changing substance." *United States v. Wise*, 370 U.S. 405, 420 (1962) (Harlan, J., concurring).

In conferring the cause of action for treble damages only upon "persons," however, the Committee showed an awareness that "person" was a technical legal term, whose scope could be extended by special definition. And in section 8 of the bill the Committee did extend the term to include all "corporations and associations." As "veteran teachers and practicers of law," specially chosen to give the Senate the best legal advice possible, the Committee were undoubtedly aware that the question had already arisen whether the term "person" might include governments as well as corporations.

17. For the evidence as to authorship of the provisions of the Act, see M. BUMPHREY, AUTHORSHIP OF THE SHERMAN ANTI-TRUST LAW: REPORT OF AN INVESTIGATION OF THE OFFICIAL RECORDS (1912). The evidence indicates that Senator Edmunds drafted sections 1, 2, 3, 5 and 6, and that Senator Hoar was the author of section 7.

18. *See* MINUTE BOOK OF THE SENATE JUDICIARY COMMITTEE, March 31, 1890 (Manuscript in National Archives of the United States), *reprinted in* M. BUMPHREY, *supra* note 17, at 75-77. On motion of Senator Edmunds, the Committee unanimously agreed "that it is competent for Congress to pass laws preventing and punishing contracts, etc., in restraint of commerce between the States." Senator Edmunds then submitted drafts of sections 1 and 2 in which the constitutionally suspect language of Senator Sherman's bill was replaced by language from the Constitution itself. Thus, the law reflected and did not exceed the constitutional grant of power.

a. In the Statutory Revision of 1874, Congress Had Narrowed the General Definition of "Person" in Order to Ensure that it Did Not Extend to Foreign Governments.

Commissioners had been appointed in 1866 to revise and consolidate the federal statutes,[19] and in order to facilitate their task (*see* CONG. GLOBE, 41st Cong., 3d Sess. 776 (1871) (remarks of Sen. Trumbull)), Congress had enacted a general definitional statute in 1871, in which, as Mr. Justice Frankfurter stated, "Congress supplies its own dictionary."[20] As originally enacted, the statute had provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . ."[21] But in 1872 the Commissioners had reported to Congress that the definitional statute's reference to "bodies politic" was ambiguous, as it might be taken to include "States, Territories, foreign governments, &c." Therefore, the Commissioners had recommended that Congress delete "bodies politic" and provide simply that "person may extend and be applied to partnerships and corporations . . . ."[22]

19. *See* Act of June 27, 1866, ch. 140, 14 Stat. 74.

20. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

21. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

22. I REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (Revisers' Note).

> The reasons for the . . . change are that partnerships ought to be included; and that if the phrase "bodies politic" is precisely equivalent to "corporation," it is redundant; but if, on the contrary, "body politic" is somewhat broader, and should be understood to include a government, such as a State, while "corporation" should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word "person," to take care that States, Territories, foreign governments, &c., appear to be excluded.

Id.

Upon enactment of the Revised Statutes in 1874, Congress had adopted the recommendation, manifesting an intention that "person," when used in federal legislation, should not include "States, Territories, foreign governments, &c.," unless extended by special definition.[23]

Statutory annotations in current use when the Sherman Act was drafted pointed out that the general definition of "person" in the first section of the Revised Statutes was narrower than that contained in the earlier version of the statute, which had included "perhaps, in some cases, States, Territories, foreign governments, &c." 1 NOTES ON THE REVISED STATUTES OF THE UNITED STATES, 1874-1889 at 1 (J. Gould & G. Tucker eds. 1889).[24]

b. In the *Fox* Case in 1876, this Court Had Confirmed the Rule that "Person" Did Not Include Foreign or Coordinate Governments Unless Extended By Express Definition.

In 1876 this Court had also confirmed that "person" included artificial persons organized under the laws of the enacting state, but that, unless extended by special definition, it did not include coordinate governments.

> The term "person" as . . . used [in the New York statute governing the devise of real property] applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And the term "corporation" in the statute applies only to such corporations as are created under the laws of the State.
> *United States* v. *Fox*, 94 U.S. 315, 321 (1876).

23. Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092 (Revised Statutes enacted into positive law). Although most of the Commissioners' substantive changes were deleted under the supervision of a joint committee of Congress (*see* 2 CONG. REC. 826 (1874) (remarks of Rep. Lawrence)), the revision of the definition of "person" was approved as a clarification of the intent of Congress, and it became a part of the very first section of the Revised Statutes as presented for enactment. *See* UNITED STATES REVISION OF THE LAWS 1 (Report of T. J. Durant, 1873).

24. For the present definition of "person," as further amended in 1948, see 1 U.S.C. § 1 (1970).

Although the case concerned New York legislation, this Court approved the principle of construction adopted by the New York court, and the opinion reflected general law. As the New York Court of Appeals stated, "no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or nation. Its meaning may be extended by express definition so as to include a government or sovereignty." *In re Fox*, 52 N.Y. 530, 535 (1873), *aff'd sub nom. United States* v. *Fox*, 94 U.S. 315 (1876).

c. In Section 8 of the Sherman Act, Congress Chose Not to Extend the Definition of "Person" to Include Foreign Governments.

When the Senate Judiciary Committee drafted the Sherman law against this background in 1890, it chose to expand the meaning of "person" somewhat beyond that established by the definitional statute and the *Fox* case. Thus, the definitional statute provided that "'person' may extend and be applied to . . . corporations . . . unless the context shows that [the word] was intended to be used in a more limited sense" (Revised Statutes § 1), and the drafters of the Sherman Act removed any doubt in that regard by providing that, for purposes of the antitrust law, "person" "shall be deemed to include" corporations. Sherman Act, section 8. The drafters also extended the term to include "associations." *Id.* The *Fox* case had suggested that only artificial persons or corporations organized under the law of the enacting state might be deemed

included by a reference to "persons," and, in order to "preclude any narrow interpretation" (*see United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941)), the Committee enumerated the four kinds of corporations which do business in this country: those organized under the laws of "the United States, . . . the Territories, . . . any State, . . . any foreign country." Sherman Act, section 8.[25]

Congress was of course aware that foreign corporations and associations were often active in American markets, and it wanted to ensure that they competed in those markets on a basis of equality with domestic persons.[26] Therefore the Judiciary Committee specifically extended the definition to include "corporations and associations existing under . . . the laws of any foreign country." Sherman Act, section 8. Although the statute referred to "any foreign country" in that connection, it did not provide that such countries should be deemed "persons."[27]

25. *See, e.g.*, G. ENDLICH, INTERPRETATION OF STATUTES (1888 ed.).

> [I]t would seem . . . that, wherever corporations are embraced under the term persons, the corporations intended would be, at least, primarily, only those created under the laws of the state upon whose statute book the act appears, and generally, only private, not public or municipal ones.

Id. at 118-19 (footnotes, citing *Fox* and other cases, omitted).

26. *See, e.g.*, 21 CONG. REC. 4472 (1890) ("powerful foreign syndicates now rapidly purchasing and controlling" protected American industries) (Rep. McAdoo); 19 CONG. REC. 4409 (1888) ("The most oppressive trusts—oppressive to the American consumer—are those which deal in foreign goods") (Rep. McKinley, citing foreign plate-glass, china, tin, and iron trusts).

27. *See United States* v. *United Mine Workers*, 330 U.S. 258, 275 (1947) ("The absence of any comparable provision extending the term [person] to sovereign governments implies that Congress did not desire the term to extend to them"); *United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941). Under the usual rule of statutory construction, *expressio unius est exclusio alterius*, foreign countries would therefore be excluded. For a recent application of the rule, see *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

In describing the final draft of the Sherman Act to the Senate, Senator Edmunds emphasized that the Judiciary Committee had made "its definitions out of terms that were well known to the law already . . .;" that it was a "bill that is clear in its terms, is definite in its definitions, and is broad in its comprehension . . . ." 21 CONG. REC. 3148 (1890). A subsequent account of Senator Edmunds' role in drafting the bill again emphasized the Committee's effort to use terms which had "a perfectly settled meaning in jurisprudence."[28] In view of the definitional revision of 1874 and this Court's decision in the *Fox* case, Congress was entitled to conclude that "person" was a term whose meaning was settled and that, unless extended by special definition, it did not include sovereign powers outside the jurisdiction of the United States.[29]

28. *See* Leupp, *The Father of the Anti-Trust Law*, THE OUTLOOK, September 30, 1911, at 273.

29. For further evidence of the effort to achieve certainty of definition, see Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 813 (1911), *quoted in Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 n.10 (1940).

> After most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific descriptions all the acts which should come within the meaning and purposes of the words "trade" and "commerce" or "trust," or the words "restraint" or "monopolize," by precise and all-inclusive definitions; and that these were truly matters for judicial consideration.
> *Id.*

"Restraint of trade" and "monopolize" were believed to have established meanings at common law. *See* 310 U.S. at 497; 36 CONG. REC. 522 (1903) (remarks of Sen. Hoar); 21 CONG. REC. 3151-52 (1890) (remarks of Sens. Hoar and Edmunds). Though well known to the public, the term "trust" lacked a common law meaning, and Senator Edmunds opposed its use, apparently for that reason. *See* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 256 (1956). "Commerce" was a term from the Constitution itself, used to establish the jurisdictional basis for the enactment. *See Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers, Inc.* v. *United*

It cannot be supposed that, when the lawyers of the Senate Judiciary Committee set out to define "person," they were unaware of the leading Supreme Court case which had construed the scope of that term. Nor can it be presumed that the Committee were unaware of the ambiguity in the general definition of "person" which had been found by the Commissioners and eliminated by statutory revision in 1874.[30]

3. *In 1914 Congress Again Defined "Person" Exactly as It Had Done in the Sherman Act.*

The second commission to revise the statutes reported in 1909 that section 8 of the Sherman Act was an "amplification" of the definition of person contained in section 1

States, 286 U.S. 427, 434 (1932). While Congress intended the Judiciary to define "commerce" so as to reflect the full scope of congressional power (*see Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 743 n.2 (1976); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 632-35 (1976) (Stewart, J., dissenting)), there can be no justification for expansion of the term "person" beyond the intent and understanding of Congress.

30. Senator Edmunds himself had been a member of the Judiciary Committee since 1867 and served as its chairman from 1873 to 1879 and from 1881 to 1891. HISTORY OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 1816-1967, S. MISC. DOC. No. 78, 90th Cong., 2d Sess. 132 (1968). In 1873 he had also served on the Senate Committee on the Revision of the Laws. *See* S. MISC. DOC. No. 7, 42d Cong., 3d Sess. 3 (1873). He was undoubtedly familiar with the final report which the Commissioners submitted to Congress when their term expired on May 4, 1873 (*see* Act of March 3, 1873, ch. 241, § 1, 17 Stat. 579), and with the reasons for the alteration in section 1, which was set forth on the very first page of the Revised Statutes as presented for enactment. Senator Hoar, then a member of the House of Representatives, also participated in debate on the Revised Statutes. *E.g.*, 2 CONG. REC. 647-48 (1874) (remarks of Rep. G. F. Hoar). He acted as speaker *pro tempore* during special evening sessions of the House devoted to the revision (*id.* at 819) and was present in that capacity when the Commissioners' definition of "vessel"—which appeared on the same page as their definition of "person"—was altered by vote of the House of Representatives. *See* 2 CONG. REC. 822.

of the Revised Statutes and that, "while the amplification is limited to the purpose of [the Sherman] act, it is believed that it may profitably be given a general application . . . ." FINAL REPORT OF THE COMMISSION TO REVISE AND CODIFY THE LAWS OF THE UNITED STATES 11 (1909) (Revisers' Note). Congress did not act upon the suggestion, but in 1914, when it defined "person" in section 1 of the Clayton Act, it used the definition of the Sherman Act, and it had every reason to suppose that the Commissioners approved that definition as consistent with the recommendation made in 1872, pursuant to which Congress had deleted the reference to "bodies politic."

Section 4 of the Clayton Act was a reaffirmation of the Sherman Act's section 7. It extended "the remedy under section 7 of the Sherman Act to persons injured . . . by the wrongful acts of persons or combinations violating any of the antitrust laws . . . ." H. R. REP. No. 627, 63d Cong., 2d Sess. 14 (1914). Congress indicated no intention to alter the meaning of the provision. *See United States* v. *Cooper Corp.*, 312 U.S. at 610. The legislative history indicates that the Sixty-third Congress understood the treble damage remedy to be available to "any citizen of the United States or denizen of the country who desires to take advantage of it." 51 CONG. REC. 13898 (1914) (Sen. Walsh).

C. The *Cooper* Case Confirmed the General Rule that "Person," As Used in Section 7 of the Sherman Act, Did Not Include Sovereign Governments.

In *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), this Court confirmed the authority of the *Fox* case as reflecting the usual rule of construction (*see* 312 U.S. at 604) and held that the United States, a sovereign government, was not itself a "person" entitled to sue for treble damages under the Sherman Act. Although the economic interests

of the United States were the same as those of American consumers, the class sought to be protected by the Act, the Court held that the language of the enactment did not confer a damage remedy upon the government and that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." 312 U.S. at 605.[31]

When Congress accorded the federal government a cause of action for single damages in 1955, it confirmed that the *Cooper* case had been correctly decided.[32] It withheld the treble damage remedy because it thought it "wholly improper" to give the domestic sovereign a monetary incentive to enforce the law (*see* S. REP. No. 619, 84th Cong., 1st Sess. 2 (1955)), and also "in view of the disastrous impact of triple damages upon concerns doing a large proportion of their business with the Government." H. R. REP. No. 422, 84th Cong., 1st Sess. 4 (1955). Although Attorney General Brownell advised Congress that a single damage remedy should be extended to the federal government since States and municipalities already possessed the right to sue for treble damages, he did not suggest that foreign governments could sue for treble damages.[33] Congress was entitled

31. In reaching its decision the Court found inapplicable a line of cases which suggested that, even when the domestic sovereign is not specifically provided for, a remedy may be implied for it in the "general words of a statute intended to prevent injury and wrong." *Nardone* v. *United States*, 302 U.S. 379, 384 (1937). *See, e.g., Dollar Sav. Bank* v. *United States*, 86 U.S. 227, 239 (1873). The statute left no room for implication of a simple compensatory remedy, such as that granted in *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967), because it had long been established that the remedies fixed by the Sherman Act are exclusive. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916).

32. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282 (codified at 15 U.S.C. § 15a (1970)).

33. Letter from Attorney General Herbert Brownell to Senator Harley M. Kilgore (June 16, 1955), *reprinted in* S. REP. No. 619, 84th Cong., 1st Sess. 7 (1955).

to conclude that, with the establishment of damage remedies for municipalities, the States, and finally the federal government, it had provided a remedy for all the governments which it saw fit to protect. *Cf. Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953).

II.

CONSIDERATIONS OF FEDERALISM, WHICH JUSTIFIED EXTENSION OF THE TREBLE DAMAGE REMEDY TO THE STATES OF THE UNION, DO NOT JUSTIFY A FURTHER EXTENSION TO THE WORLD'S SOVEREIGN GOVERNMENTS.

The decision in *Georgia* v. *Evans*, 316 U.S. 159 (1942), should be regarded as an exception to the more general rule as to sovereign governments which this Court had applied in the *Cooper* case. In *Georgia* v. *Evans* the Court acknowledged the authority of that general rule, but held that Congress must have intended to create an exception in order to afford a remedy to the States of the Union. The exception was based on considerations which are peculiar to our federal system.

It had early been held that a city could sue for treble damages because it was a "municipal corporation" formed under State law. *See City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F. 23, 25 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).[34] Congress had as good reason to protect the States as it did to protect municipal corporations, and, in *Georgia* v. *Evans*, the State of Georgia contended that "[i]f the word 'person' as used in the statute

34. *But see City of Kenosha* v. *Bruno*, 412 U.S. 507, 512-13 (1973) and *Monroe* v. *Pape*, 365 U.S. 167, 191 & n.50 (1961), holding that municipal corporations were not "persons" for purposes of the statute there at issue.

excludes the sovereign, the State may yet maintain an action," because it "has effectively divested itself of its sovereignty with reference to . . . interstate commerce . . . and is relegated to the status of a private individual." Brief for Appellant at 37, *Georgia* v. *Evans*, 316 U.S. 159 (1942). Upon ratification of the Constitution, the States had ceded to Congress their sovereign authority over interstate and foreign commerce, and Congress had assumed a corresponding obligation to exercise that power in the interest of the States and their inhabitants. It would have been anomalous to conclude that Congress had enacted comprehensive antitrust legislation but had chosen to leave the States without remedy thereunder.

Georgia's argument had support in the legislative history. A principal reason for enactment of the federal antitrust law had been that state laws, with their limited territorial jurisdiction, had proved ineffective to destroy economic combinations such as the sugar trust. 21 CONG. REC. 2459 (1890) (remarks of Sen. Sherman). It was quite clear that Congress intended the federal antitrust law to "supplement" that of the States. *See* 21 CONG. REC. 2457 (remarks of Sen. Sherman); H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890).

Moreover, in view of the division of power in our federal system, it appeared that if a State had no damage remedy as a "person" protected by the Sherman Act, then, at least in some circumstances, it might have no remedy whatever, not even a remedy under its own antitrust laws.

Thus, the House Judiciary Committee had reported in 1890 that "Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations." H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890). This Court had con-

firmed that view in 1895. *See United States* v. *E. C. Knight Co.*, 156 U.S. 1, 12 (1895) ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State").

Even if the prohibition of the State's antitrust law were identical to that of the federal statute, this Court's decision in *Charleston & Western Carolina Railway* v. *Varnville Furniture Co.*, 237 U.S. 597 (1915), suggested that it would be unconstitutional to apply state law to interstate transactions in order to impose additional liabilities over and above those fixed by Congress.

> When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.
> 237 U.S. at 604.

A similar view was expressed in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

When *Georgia* v. *Evans* was decided in 1942, the Court was well aware that decisions then recent had vastly expanded the scope of interstate commerce subject to the federal antitrust laws, but it still sought to draw a line between intrastate and interstate commerce. *See Parker* v. *Brown*, 317 U.S. 341, 363 (1943); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).[35] The result suggested by authoritative cases,

35. Compare the views subsequently articulated in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 232 (1948) ("necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins"), and in *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954) ("Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases"). *See also Wickard* v. *Filburn*, 317 U.S. 111 (1942).

preemption of a State's antitrust law as it affected interstate commerce, would have meant that a State's civil and criminal remedies under its own law had become applicable in an ever narrower area as the federal judiciary had expanded the scope of interstate commerce. Far from supplementing a State's antitrust protection, in some cases the federal enactment might have deprived the States of any remedy whatever.

As Mr. Justice Frankfurter stated for the Court in *Georgia* v. *Evans*, if the federal antitrust law were interpreted to afford the States no damage remedy, then "no remedy whatever [would be] open to a State when it is the immediate victim of a violation of the Sherman Law. . . . Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State." 316 U.S. at 162-63.

Even if the States retained some freedom to apply their antitrust laws in respect of interstate transactions already subject to federal control, federal policy favored avoidance of potential conflict.[36]

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36. In a later case the Court suggested there was some room for concurrent regulation (*California* v. *Zook*, 336 U.S. 725, 729-31 (1949) (5-4 decision)), but Justice Frankfurter's dissent in that case sheds light upon his reasoning in *Georgia* v. *Evans*. He insisted that California could not impose additional sanctions upon interstate carriers for their failure to meet federal requirements:

> One would suppose that, when Congress has proscribed defined conduct and attached specific consequences to violations of such outlawry, the States were no longer free to impose additional or different consequences by making the same misconduct also a State offense. . . .
>
> For the first time in the hundred and twenty-five years since the problem of determining when State regulation has been displaced by federal enactment came before this Court, . . . the Court today decides that the States can impose an additional punishment for a federal offense unless Congress in so many words forbids the States to do it.

336 U.S. at 738-39. *See* Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961).

These "considerations of federalism" are inapplicable to foreign governments.[37] Unlike the States, foreign governments possess plenary power to regulate their exports and imports, and they do so in accordance with their own economic philosophies. They are free, if they wish, to enact their own antitrust laws.[38] Unlike the States, they may apply their laws to transactions in international trade with no need to observe the constraints of the Constitution. *Cf. Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). They have yielded none of their sovereign powers to Congress, and Congress has assumed no obligation to regulate the trade practices of American exporters for their benefit. Congress expressed the intention that state and federal antitrust laws should supplement each other, but it expressed no similar concern for foreign countries.

III.

JUDICIAL EXTENSION OF THE TREBLE DAMAGE REMEDY TO FOREIGN GOVERNMENTS WOULD CONFLICT WITH THE POLICIES OF THE LAW.

Congress had good reason to grant the treble damage remedy to foreign corporations but to withhold it from foreign governments. While foreign corporations sought to do business and to acquire property in this country and thus might place themselves within the jurisdiction of the

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37. *See Israel-British Bank (London) Ltd.* v. *Federal Deposit Ins. Corp.*, 536 F.2d 509, 514 (2d Cir.), *cert. denied*, 97 S.Ct. 487 (1976) (reference to "banking corporations" held to mean only those organized under state or federal law, not foreign banking corporations).

38. As Senator Sherman said, "We give to foreign nations the light of our example, but our duty is to our own." 19 CONG. REC. 192 (1888). Respondents India and the Philippines have enacted antitrust legislation. *See* India Monopolies and Restrictive Trade Practices Act, 1969, 14 INDIA A.I.R. MANUAL 657 (1972); PHILIPPINES REV. PENAL CODE art. 186 (1972).

United States, Congress was well aware that it could exercise little effective control over the policies and activities of sovereign governments. It was conceivable that such a government might undertake to engage in commercial activities in this country, but it would have seemed preferable that it do so in corporate form, thus divesting itself of any claim of sovereign privilege. *See Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) ("The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law"); *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 907-08 (1824). It is not uncommon for corporations to possess rights which are denied to the foreign sovereigns which own their stock. *E.g., Amtorg Trading Corp.* v. *United States*, 71 F.2d 524 (C.C.P.A. 1934) (corporation allowed to sue, although owned by unrecognized foreign government). Unlike the distinction between "commercial" and "governmental" activities, which has been described as a "quagmire" (*see Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955)), the test of sovereign or corporate status had the virtue of clarity of application, and it remains a sound basis of distinction in this and other contexts.

Thus, for purposes of the recently enacted section 7A of the Clayton Act,[39] the Federal Trade Commission has proposed regulations which provide that "'person' shall not include any foreign state, government, or agency thereof (other than a corporation engaged in commerce or in any activity affecting commerce)." 41 Fed. Reg. 55490 (1976). The Antitrust Division of the Department of Justice concurred in the definition.[40]

39. 15 U.S.C.A. § 18a (West Supp. 1977), *as added by* Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, tit. II, § 201, 90 Stat. 1390.

40. *See* 15 U.S.C.A. § 18a(d)(2)(A) (West Supp. 1977); 41 Fed. Reg. 55488 (1976).

In the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 4(a), 90 Stat. 2894, Congress adopted the restrictive view of sovereign immunity, but it reaffirmed the distinction between sovereign governments and the "persons" who serve as their instrumentalities, since it provided that, even when acting in a commercial capacity, foreign sovereigns may not be held liable for "punitive damages," though their "agency or instrumentality" may be so liable. *Id.* (codified at 28 U.S.C.A. § 1606 (West Supp. 1977)). "Agency or instrumentality of a foreign state" is defined as "a separate legal person, corporate or otherwise." *Id.*, 90 Stat. 2892 (codified at 28 U.S.C.A. § 1603(b)(1) (West Supp. 1977)).[41]

There can be no contention that the term "person" should be broadened by judicial decision in order to effectuate any supposed purpose to protect the interests of foreign consumers or their sovereign governments.[42] The Sherman

41. Although the question whether foreign governments may ever be held liable under the antitrust laws is not presented in these cases, it is noteworthy that in 1890 Congress repeatedly characterized treble damages as a "penalty" (21 CONG. REC. 1765, 1767, 3146, 3147), "a punitory verdict" (*id.* at 4091), and it appears that even today Congress would decline to impose such damages upon foreign sovereigns. In any case, the 1976 enactment was "not intended to affect the substantive law of liability" under prior statutes. H.R. REP. No. 1487, 94th Cong., 2d Sess. 12 (1976); *see id.* at 22. The Sherman Act "gives no hint that it was intended to restrain state action or official action directed by a state." *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). *See Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 78 n.14 (2d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3692 (U.S. Apr. 19, 1977) (No. 76-1403) ("We agree that Libya cannot be guilty of a Sherman Act violation . . . because it is not a person or corporation within the terms of the Act but a sovereign state"). Also not presented in these cases is the question whether foreign countries are "persons" who may be barred from using the Panama Canal if adjudged in violation of the antitrust laws. *See* 15 U.S.C. § 31 (1970).

42. *See Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818).

bill concerned itself with combinations which "advance the cost to the [domestic] consumer"; it referred to imports and to articles transported from one State to another, but not to exports, nor to goods transported from a State to a foreign country.[43] The language finally employed in the statute was taken from the Constitution itself, in order to ensure the constitutionality of the enactment (*see Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 434 (1932)), not to extend the protection of the statute to the world's foreign nations.

This understanding was confirmed by the subsequent legislative history. In 1916, at the direction of Congress, the Federal Trade Commission reported its conclusion that Congress had not intended to forbid combinations in the export trade which exerted their effect upon foreign interests, and it recommended the enactment of "declaratory" legislation to confirm this view.[44] Congress responded by

43. For the successive drafts of the bill, see 21 CONG. REC. 2597-2600 (1890) (reprinted to accompany speech of Sen. George).

44. I FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE (1916):

> The Commission does not believe that Congress intended by the antitrust laws to prevent Americans from cooperating in export trade for the purpose of competing effectively with foreigners, where such cooperation does not restrain trade within the United States and where no attempt is made to hinder American competitors from securing their due share of the trade. It is not reasonable to suppose that Congress meant to obstruct the development of foreign commerce by forbidding the use in export trade of methods of organization which do not operate to the prejudice of the American public, are lawful in the countries where the trade is to be carried on, and are necessary if Americans are to meet competitors there on more nearly equal terms.

Id. at 9.

The Commission reported pursuant to section 6(h) of the Federal Trade Commission Act, Act of Sept. 26, 1914, ch. 311, § 6(h), 38 Stat. 722 (codified at 15 U.S.C. § 46(h) (1970)).

enacting the Webb-Pomerene Act,[45] which affirmatively established that the policy of Congress was to maximize the value of American exports.[46] Like the report of the Federal Trade Commission, the report of the House Judiciary Committee which accompanied the Webb-Pomerene bill emphasized that it was declaratory of the existing rights of American exporters.[47]

45. Act of Apr. 10, 1918, ch. 50, §§ 1-5, 40 Stat. 516-17 (codified at 15 U.S.C. §§ 61-65 (1970)).

46. As the Court stated in *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 207-208 (1968):

> The legislative history is even more explicit. During the hearings on the bill, one Congressman, Charles C. Carlin of Virginia, stated clearly what was later to be one of the dominant themes of the floor debate . . . .
>
> "I am frank to say that personally I have no sympathy with what a foreigner pays for our products; I would like to see the American manufacturers get the largest price possible, but if by indirection we are going to set up a system which is going to fix a higher price eventually at home, through a combination as suggested in this bill, I think you can very well see that such a system is a very dangerous one." Hearings before the House Committee on the Judiciary on H.R. 16707, 64th Cong., 1st Sess., 7 (1916).
>
> The same theme was reiterated on the floor by the Act's two main sponsors. Senator Pomerene said bluntly "[W]e have not reached that high plane of business morals which will permit us to extend the same privileges to the peoples of the earth outside of the United States that we extend to those within the United States." 55 Cong. Rec. 2787 (1917). And Congressman Webb declared, "I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." 55 Cong. Rec. 3580 (1917).

47. H.R. REP. No. 50, 65th Cong., 1st Sess. (1917).

> The bill does not authorize any violation of the present antitrust laws. There are many great lawyers who think there is nothing in existing laws to prevent American manufacturers and exporters from combining in whatever manner they please in foreign countries to dispose of their products, but other lawyers take the position that there is doubt about this power,

Thus, throughout the period of the Sherman, the Wilson Tariff, the Clayton and the Webb-Pomerene Acts, Congress pursued an economic policy which distinguished sharply between foreign and domestic interests. It sought both to ensure free competitive conditions in this country and to foster the domestic economy in preference to the economies of foreign nations. Congress continues to pursue both goals.[48]

The Department of Justice has argued that the definition of "person" should be expanded to allow treble damage suits by foreign governments, as this might "supplement the federal government's limited enforcement capacity with private suits, so as to deter future violations." Memorandum of the United States as Amicus Curiae at 3. But this would sacrifice one policy of Congress in supposed furtherance of the other.

The argument also disregards the teaching of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690 (1977), that, despite its usefulness as a deterrent, the treble damage remedy is indeed "designed primarily as a remedy." *Id.* at 696. Punitive damages and an attorney's fee were authorized in order to ensure the effectiveness of the remedy, to counterbalance "the difficulty of maintaining a private suit against a combination such as is described." 21 Cong. Rec.

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and in order to absolutely clarify the situation and in common fairness to our American exporters we present this bill. The bill prohibits the slightest violation of our antitrust laws within the United States, but makes it clear that American exporters doing business in foreign countries are to be allowed to do business in those foreign countries according to the foreign laws.

Id. at 3. *See* K. Brewster, Antitrust and American Business Abroad 105-106 (1958).

48. *See, e.g.*, Balance of Payments Act of 1965, Act of Sept. 9, 1965, Pub. L. No. 89-175, § 1, 79 Stat. 672.

[I]t is declared to be the policy of Congress to safeguard the position of the United States with respect to its international balance of payments.

2456 (1890) (Sen. Sherman). Remedies, by definition, are reserved for redress of the kind of injury which it was the purpose of the statute to prevent.

Numerous cases have rejected the notion that the treble damage remedy should be expanded beyond the intention of Congress in order to achieve deterrent effect. As the Court observed in *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251 (1972), "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 263 n.14. *See, e.g., Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir), *cert. denied*, 411 U.S. 938 (1973) ("Appellant is not among those . . . which the prohibition of this type of violation was clearly intended to protect"). In such cases recovery was denied, even though enforcement of the treble damage remedy would have imposed added penalties upon transgressors of the antitrust laws. *See also Illinois Brick Co.* v. *Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977).

Even if treble damages were conceived solely as a means of enforcement, it is improbable that Congress would have wished to recruit foreign governments as "private attorneys general" to aid in enforcing our laws. Congress thought it "wholly improper" to give the United States a monetary incentive to enforce those laws (S. Rep. No. 619, 84th Cong., 1st Sess. 3 (1955)), and mercenary enforcement by foreign sovereigns, most of which do not share our antitrust principles, would have seemed even more distasteful. The Fifty-first Congress approved McKinley's admonition to foreign sovereigns: "'We will not interfere in your domestic legislation; and we admonish you to keep your hands off of ours.'" 21 Cong. Rec. 4253 (1890). Even the Ninety-fourth Congress, which enacted the Antitrust Improvement Act of 1976, saw no need to authorize suits by foreign

governments in behalf of their citizens, even though it invited such suits by the attorneys general of the States.[49]

Congress would also have thought it a bad bargain to exchange treble damages for such enforcement assistance as foreign governments might vouchsafe. Remote from our affairs, they are likely to complain of alleged restraints in our domestic markets only after the federal government or domestic plaintiffs have commenced proceedings, as in the instant cases. As pioneer litigants, they may claim treble damages in respect of their purchases of armaments or equipment, but such purchases, though they may occur on a vast scale, are likely to have little relationship to the restraints which harm domestic consumers. Congress feared "the disastrous impact of triple damages upon concerns doing a large proportion of their business with the Government" (H. R. Rep. No. 422, 84th Cong., 1st Sess. 4 (1955)), and the cumulative impact of treble recoveries by foreign governments could be equally severe.[50]

In establishing the treble damage remedy, Congress created a medicine for the domestic economy; but it also prescribed the dosage when it conferred that remedy only upon "persons," and limited even the domestic sovereign to single damages. If antitrust violators restrain their domestic competitors from dealing with foreign governments, such competitors may well have a cause of action and should be relied on to enforce it. *See Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). It is not

49. *See* Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, tit. III, § 301, 90 Stat. 1394-95 (codified at 15 U.S.C.A. § 15c (West. Supp. 1977)).

50. Unlike the usual case in which a foreign corporation recovers treble damages (*see Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); I.R.C. §§ 881, 882), a recovery by a foreign sovereign would be free of United States income tax. I.R.C. § 892. *See* Rev. Rul. 298, 1975-2 C.B. 290.

necessary to extend a cause of action to the world's foreign governments. The enforcement of the antitrust laws should be left to the federal government and to the "persons" Congress had in mind when it established the treble damage remedy.

CONCLUSION

The record of experience under the Sherman and Clayton Acts indicates that, for some three quarters of a century after enactment of the Sherman Law, it was assumed that foreign countries had no claim for treble damages. *Cf. In re Antibiotic Antitrust Actions*, 333 F. Supp. 315, 316 n.3 (S.D.N.Y. 1971)(A6). "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941). *Accord, United States* v. *Cooper Corp.*, 312 U.S. 600, 613-14 (1941). *See also Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

The general rule applied by this Court is that the Judicial Branch should leave to Congress the decision whether to provide particular damage remedies. *E.g., Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972); *United States* v. *Gilman*, 347 U.S. 507, 511-13 (1954); *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 314-17 (1947); *see Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 206-11 (1976). The Judiciary should not create a cause of action that Congress did not intend.

The admonition as to judicial restraint is especially appropriate today when many of the world's foreign countries are arrayed in trade combinations which conflict with the philosophy of the antitrust laws, but which our govern-

ment has been substantially powerless to prevent. The Judicial Branch should not undertake to extend the cause of action for treble damages to foreign governments without allowing our own government to obtain something in return. If the decision is made to grant foreign countries the rights here at issue, it should be made by Congress.

Accordingly, for the reasons set forth above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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